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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 KARMEN SMILEY,

11 Plaintiff,

12 v.

13 HOLOGIC, INC., a Delaware
14 corporation, and DOES 1 through 20,

Defendants.

CASE NO. 16cv158-WQH-MDD

ORDER

15 HAYES, Judge:

16 The matter before the Court is the motion for summary judgment filed by
17 Defendant Hologic, Inc. (ECF No. 39).

18 **I. Background**

19 On November 18, 2015, Plaintiff Karmen Smiley initiated this action by filing
20 a complaint in Superior Court in the State of California for the County of San Diego
21 alleging two causes of action against Defendant Hologic, Inc.: (1) retaliatory
22 termination in violation of California Labor Code section 1102.5, and (2) wrongful
23 termination in violation of public policy. (ECF No. 1-2). Plaintiff's second cause of
24 action alleges that her wrongful termination violates two public policies: (1) "for
25 employers not to retaliate against an employee for disclosing information to another
26 employee with the authority to investigate or correct violations where the employee has
27 reasonable cause to believe that the information discloses a violation of state or federal
28 statute or a violation or non-compliance with a state or federal rule or regulation", and

1 (2) “to neither discharge, nor formerly discipline, nor otherwise discriminate against an
2 employee who discloses such information.” *Id.* at 7.

3 On January 22, 2016, Defendant removed this action from Superior Court to
4 United States District Court for the Southern District of California pursuant to 28
5 U.S.C. §§ 1332 and 1441(a),(b). (ECF No. 1 at 2). On January 22, 2016, Defendant
6 filed an Answer. (ECF No. 2).

7 On October 14, 2016, Defendant filed a motion for summary judgment, or in the
8 alternative, partial summary judgment. (ECF No. 39). On November 7, 2016, Plaintiff
9 filed a response in opposition. (ECF No. 44). On November 14, 2016, Defendant filed
10 a reply. (ECF No. 46). The Court heard oral argument on the motion for summary
11 judgment on February 24, 2017.

12 **II. Factual Background**

13 In a declaration filed by Defendant, Thomas Cardoso, a Hologic Human
14 Resources Business Partner for the Finance Department in San Diego, states,

15 Based on a review of [Plaintiff’s] file, I know Plaintiff
16 worked for Gen-Probe Incorporated from October 2004 until
17 August 2012 when the company was acquired by Hologic, at
18 which point Plaintiff began working for Hologic. . . . Plaintiff
19 originally was hired as a Fixed Asset Accountant (later
20 referred to as an Accountant II). On June 25, 2007, Plaintiff
21 was transferred to the Cost Accounting Department as a Cost
22 Accountant II. Plaintiff held this position until her
23 termination on July 24, 2015. . . . As a HR Business Partner
24 I was also involved with the final decision to terminate
25 Plaintiff’s employment and assisted her supervisors Chun
26 Ren and John O’Shea through the process. The decision to
27 terminate Plaintiff’s employment was made and finalized
28 within a day of her missing a performance meeting on July
20, 2015. As such, the decision to terminate Plaintiff’s
employment was finalized no later than July 21, 2015.
However, as Plaintiff had already demonstrated that she
would not attend a meeting with her supervisors and I, we
used a previously scheduled appointment that Plaintiff had
with another HR Business Partner, Stephanie Heller, on July
23, 2015 to communicate this decision with her. . . . Plaintiff
was initially to be terminated on July 23, 2015. However, as
she had a vacation day scheduled for July 24, 2015, the
company moved back her official termination to July 24,
2015. Her last day worked, however, was July 23, 2015.

(Cardosa Decl., ECF No. 39-8).

1 In the deposition of John O' Shea, Senior Director of Finance at Hologic, O' Shea
2 states that he was hired at Hologic in January of 2015 and was the direct supervisor of
3 Joe Abramson, a senior finance manager, before Abramson left Hologic. O' Shea states
4 that Chun Ren was hired to fill Abramson's position and, following some management
5 changes, became Plaintiff's supervisor. (O'Shea Dep., ECF No. 39-4 at 13-18).
6 O'Shea states that Plaintiff's primary role was cost accounting and that her cost
7 accounting was not reliable. *Id.* at 19. O'Shea states, "I first became aware that there
8 were issues with Karmen's work beginning in April of 2015 for the March close." *Id.*

9 In a declaration by Chun Ren, Senior Manager of Cost Accounting at Hologic,
10 Ren states,

11 From the time of my hire to July 23, 2015, I was Karmen Smiley's direct
12 supervisor. As her direct supervisor, I was responsible for reviewing Ms.
13 Smiley's work. As soon as I began working with Ms. Smiley, I began to
14 notice errors in her work. When I attempted to address these errors with
15 Ms. Smiley, I received push back, and while some of the errors would be
16 corrected, I continued to see errors and have concerns with her
17 performance.

18 [] Therefore, I began documenting Ms. Smiley's performance issues with
19 the purpose of having a performance discussion with Ms. Smiley. The
20 goal of this performance meeting was never to terminate Ms. Smiley, but
21 rather to engage in dialogue regarding my concerns and issue Ms. Smiley
22 a Performance Improvement Plan. I began documenting my concerns with
23 Ms. Smiley in late May or early June.

24 [] By mid-July 2015, my supervisor John O'Shea, the Human Resources
25 Business Partner, Thomas Cardosa and I felt we had sufficient specific
26 examples of Plaintiff's performance problems to allow us to have a
27 productive performance conversation with Plaintiff. I emailed my list of
28 performance concerns to Mr. Cardosa, who incorporated the points into an
agenda for the meeting. . . .

[] I reached out to Plaintiff by Lync conversation on or about July 16,
2015 to schedule the meeting. . . . Plaintiff failed to respond to my inquiry.

[] Therefore on July 19, 2015, I sent an invitation to Ms. Smiley, Mr.
O'Shea and Mr. Cardosa for a meeting to be held on July 20, 2015, to
discuss Plaintiff's performance issues and unprofessional attitude and to
issue Plaintiff a Performance Improvement Plan.

[] Ms. Smiley failed to attend this meeting, so Mr. O'Shea, Mr. Cardosa,
and I were never able to address any of the concerns we had with
Plaintiff's performance. Because of Ms. Smiley's demonstrated
performance deficiencies, her unprofessional behavior, her outright refusal
to work towards a constructive solution to her ongoing problems, and the
final straw of her refusal to attend a performance meeting, Mr. O'Shea,

1 Mr. Cardoso and I made the decision to terminate Ms. Smiley's
2 employment.

3 (Ren Decl., ECF No. 39-6 at 1-4).

4 Attached to the Ren declaration is a copy of the proposed agenda for the
5 performance meeting Ren intended to have with Smiley. (Exhibit A, ECF No. 39-7 at
6 3-5). The proposed agenda documents a number of "work errors" and instances of
7 "attitude/behavior." *Id.* Attached to the Ren declaration is a copy of a message Ren
8 sent to Plaintiff. (Exhibit B, ECF No. 39-7 at 7). In the message dated July 16, 2015,
9 Ren states, "Are you going to be in the office on Monday? I am trying to schedule a
10 meeting as we talked about." *Id.* Attached to the Ren declaration is a invitation to a
11 meeting dated July 19, 2015, to Ren, Smiley, Cardoso, and O'Shea scheduled for July
12 20, 2015 at 10:00 a.m. (Exhibit C, ECF No. 39-7 at 9).

13 Attached to the deposition of Plaintiff is a copy of Plaintiff's response to the
14 meeting invitation in which Plaintiff states, "Thanks, but please don't" and declines the
15 July 20, 2015 meeting invitation. (Exhibit C, ECF No. 39-4 at 44-45). In a copy of an
16 email chain dated July 20, 2015, Ren states that Plaintiff needs to attend the meeting.
17 (Exhibit C, ECF No. 39-4 at 67-68).

18 In the deposition of Thomas Cardoso, Cardoso states that he, Ren, and O'Shea
19 were present for the July 20, 2015 meeting. Cardoso states that Plaintiff was not
20 present. (Cardosa Dep., ECF No. 39-4 at 115-16). Cardoso states,

21 The recommendation to terminate Karmen's employment was based that
22 [sic] she refused to attend a performance conversation. The previous
23 topics that we discussed today were going to be included in that
24 conversation. In no way, shape, or form was that meeting to be a
25 termination meeting. It was to provide Karmen with specific documented
26 examples where she can – she can understand what's expected of her so
27 that she could be successful as an Accountant II at Hologic.

28 *Id.* at 113. Cardoso states that the decision to terminate Plaintiff was made following
the scheduled July 20, 2015 meeting that Plaintiff failed to attend. *Id.* at 117-18.

In a declaration by John O'Shea, Senior Director of Finance for the Diagnostic
Division at Hologic, O'Shea states,

[] Hologic is a leading developer, manufacturer, and supplier of diagnostic

1 products, medical imaging systems and surgical products. Hologic's core
2 business segments include Diagnostics, Breast Health, GYN Surgical, and
3 Skeletal Health. Hologic is a publicly traded company that is required to
file quarterly financial statements with the Securities and Exchange
Commission.

4 [] As a Senior Director of Finance for the Diagnostics Division of Hologic,
5 I am a responsible [sic] for managing the finance team in Hologic's San
6 Diego Location. Part of the duties of the San Diego finance team is to
7 complete what is referred to as the Grifols Reclass, which is further
explained below. As a result of my experience working with the Grifols
Reclass, and supervising the process, I have personal knowledge of the
facts below.

8 [] Hologic's Diagnostic segment includes the Molecular Diagnostics
9 ("MDX") and Blood Screening divisions, among others.

10 [] Hologic sells several Diagnostic products across the globe. For internal
11 record keeping, these sales are tracked by division (i.e. MDX or Blood
12 Screening) and by geographic code ("Geo Code"). Different Geo Codes
13 are assigned to different countries. The division allocation is determined
14 by the customer, while the location is determined by the country where the
15 product was sold. As such, the same product, depending on to whom it is
16 sold, can be allocated to different divisions.

17 [] When a product sells and an invoice is created, Hologic's accounting
18 system automatically generates an entry which "maps" the "revenue" and
19 the "cost of goods sold" for each product listed on the invoice to both a
division and to a Geo Code. However within Hologic's accounting
system, each product can only be "mapped" to a single Diagnostic
division. In the case of these products, when operating correctly,
regardless of the customer, a domestic sale of a Diagnostic product should
automatically create a Revenue and Cost of Goods Sold entry in the MDX
division under a domestic Geo Code. Similarly, an international sale of
a Diagnostic product should automatically create a Revenue and Cost of
Goods sold entry in the MDX division under the appropriate international
Geo Code.

20 [] Relevant to the current case, Hologic sells several dual-division
21 products through its partnership with Grifols, a Spanish multinational
22 pharmaceutical and chemical company. Diagnostic products sold to
Grifols are accounted for under the Blood Screening division.
Consequently, and as explained above, because Hologic initially records
all Grifols product sales to MDX (either Domestic or International, as
23 appropriate), a manual reclassification must be performed during the
24 month-end close to transfer the Revenues and Costs of Goods Sold
attributable to Grifols out of the MDX division and into Blood Screening.
Hologic refers to this standard monthly reclassification as the "Grifols
25 Reclass." Prior to her termination, Ms. Smiley regularly and repeatedly
26 processed the Grifols Reclass entry during month-end close.

27 [] In June 2015, I received a request to investigate a \$1.4 million *credit*
28 balance in MDX's International Cost of Goods Sold accounts for various
international locations related to third-quarter 2015 Grifols sales.

[] Over roughly a one month period, the Senior Manager of Cost

1 Accounting and I, with assistance from Karmen Smiley, investigated the
2 International \$1.4 million Cost of Goods Sold credit to determine the
3 source. Ms. Ren and I ultimately determined that during the third-quarter
4 of 2015, Hologic's automated accounting system incorrectly recorded Cost
5 of Goods Sold related to certain international Grifols product sales to the
6 domestic Geo Code instead of the corresponding international Geo Code.

7 [] This error had two primary effects, the first of which is obvious – it
8 overstated the amount of Costs of Goods Sold attributable to the domestic
9 Geo Code. Second, and less obvious, since Ms. Smiley was unaware of
10 the automated system error, she had continued to do the standard monthly
11 Grifols Reclass. This meant Plaintiff transferred the Costs of Goods Sold
12 from MDX International even though Hologic's accounting system had
13 never initially recorded the costs in that account.

14 (O'Shea Decl., ECF No. 39-11).

15 In the deposition of Chun Ren, Ren states that following the investigation she
16 provided an instruction to Plaintiff on how to prepare the journal entry “based on all the
17 results and agreed between John O’ Shea, myself, Joy, and corporate, and Karmen was
18 included in all of the conversation.” (Chen Dep., ECF No. 39-4 at 78-80). Ren states,
19 “I walk [Plaintiff] through exactly why we’re doing this and there are six journal entries,
20 right, so I walk her through each single one of them and she put them into a journal
21 entry form and locked the form into the system, which was Oracle, and submitted and
22 I reviewed and posted.” *Id.* at 80. Ren states that she signed and approved the Grifols
23 correction journal entries on July 1st or 2nd.¹ *Id.*

24 In the deposition of Plaintiff Karmen Smiley, Plaintiff states that prior to her
25 termination, she discussed the Grifols Reclass with Rich Noel, Chun Ren, Joy Umayam,
26 Allison Ericson, and “Carrie.” (Smiley Dep., ECF No. 44-2 at 13). Plaintiff states that
27 she had her first conversation with Ren regarding the Grifols Reclass when Ren “told
28 her to reclass all three months . . . cost of goods sold.” *Id.* at 14. Plaintiff states, “I told
her we don’t have any basis for it, and I told them that’s against [Sarbanes-Oxley],
because it’s a 3.4 million, and it’s a big flier for Ernst & Young; and they would like
to have a details [sic] analysis of what they’re for.” *Id.*

Plaintiff states that she spoke with Rich Noel over the telephone about the Grifols

¹ These journal entries are referred to as the “Grifols Reclass.”

1 Reclass,

2 I said [to Noel on the phone] that I was forced to perform an entry in
3 Oracle. And I said having no support to a transaction, an adjustment to
4 your general ledger, is in violation to [Sarbanes-Oxley]. This is first of all.
5 And second of all is I don't think the transactions were correct. So before
6 we get dinged by the auditors, I might as well get us, we are a team, to
7 make sure the transactions were right. If I was wrong, I'll say okay.
8 Because . . . I felt like I have a fiduciary duty to question something that
9 I think is wrong. And if — if Rich Noel said, yes, what they told you is
10 correct, I will tell them and say okay, everything is dandy, Rich Noel said
11 our adjustments were right. So there is really no malicious — I don't have
12 any malicious intention.

13 (Smiley Dep., ECF No. 39-4 at 36).

14 In another portion of her deposition, Plaintiff states that she told Allison Ericson,
15 Rich Noel, Chun Ren, and Joy Umayam about the “alleged violations [she] witnessed
16 at Hologic” but does not remember telling anybody else. *Id.* at 23. Plaintiff states that
17 she did not contact anyone at a government agency or outside of Hologic prior to her
18 termination. *Id.* at 24. Plaintiff states that the “third-quarter 2015 Grifols
19 reclassification” was the only conduct she believed was illegal. *Id.* at 28. Plaintiff
20 states that on the day prior to her termination she told Ren about her conversation with
21 Noel. Plaintiff states that this occurred,

22 When I told her that . . . I called Rich Noel, and I told him I don't think
23 we're in compliance, I want to make sure I get his input. Because we're
24 getting audited by Ernst & Young, and I'd rather we fix it ourselves rather
25 than get written up and get a . . . bad review from Ernst & Young, and it
26 won't be reported to SEC.

27 *Id.* at 28. Plaintiff states that the day before she got fired she “told Joy Umayam and
28 Chun Ren that I think we need to reclass this, because it was clearly wrong. And it was
verified by Rich Noel . . . and I told him we're going to be in violation if we don't fix
this.” *Id.* at 28-29.

Plaintiff states that she told Ren she would be declining the July 20, 2015
meeting. *Id.* at 55-56. Plaintiff states that she was terminated at a meeting with
Stephanie Heller, John O'Shea, and Chun Ren and that the reason given for her
termination was insubordination. *Id.* at 57.

In the deposition of Rich Noel, Noel states that he had a conversation via Lync

1 messaging and telephone with Plaintiff on July 21, 2015 about the appropriateness of
2 a method of doing a correcting journal entry. (Noel Dep., ECF No. 44-2 at 21).

3 In her declaration, Joyce Umayam, a Manager of Financial Planning and Analysis
4 for Hologic, states,

5 In my capacity as a Manager of Finance, I am not involved with cost
6 accounting, but rather handle revenue reporting. For example, while I am
7 responsible for reclassifying the revenue for Hologic products sold to
8 Grifols, I am not involved at all in the reclassification of any costs and
9 have no familiarity with the process. I also do not have authority to
investigate, discover, or correct any violation regarding cost accounting
entries. . . . As a Manager of Finance in Financial Planning and Analysis,
I also have no authority over any cost accounting employee, including
Karmen Smiley.

10 (Umayam Decl., ECF No. 39-5 at 2).

11 In a declaration by Allison Ericson, Human Resources Business Partner at
12 Hologic, Inc., Ericson states,

13 In July of 2015, I was employed by Hologic as an Organizational
14 Development and Learning Specialist. In my capacity as an
15 Organizational Development and Learning Specialist, I was responsible
for creating and presenting leadership and management training to
employees at Hologic.

16 [] In July 2015, I was approached by Karmen Smiley because she wanted
17 to speak with someone in Human Resources regarding her manager's
18 manager John O'Shea. She did not go into specifics, but she did mention
that she had issues with him questioning her work during a meeting and
there was some accounting data he asked her to present in a way in which
she did not agree.

19 [] As an Organizational Development and Learning Specialist, I had no
20 authority over Ms. Smiley. I did not direct Ms. Smiley, assess her
21 performance or weigh in on any decision regarding Ms. Smiley's
employment.

22 [] Similarly, by virtue of my position, other than to provide employees
23 training, I did not have authority to investigate, discover, or correct any
24 violation occurring in the finance department or have any involvement in
the department's operations in general. Indeed, because I did not have the
authority to address Ms. Smiley's concerns, I instructed her to speak with
Stephanie Heller, the Director of Human Resources.

25 [] I followed up with Ms. Heller, after Ms. Smiley approached me, to let
26 her know that Ms. Smiley wanted to speak to her regarding her
27 management, but provided no specifics to Ms. Heller.

28 [] I also spoke to Thomas Cardoso regarding my interaction with Ms.
Smiley, but specifically recall that it was after the decision to terminate
Ms. Smiley had been made.

1 (Ericson Decl., ECF No. 39-10).

2 In a deposition of Joseph Abramson, a former senior manager of cost accounting,
3 Abramson states that in his five to six years as senior manager of cost accounting, he
4 was senior to Plaintiff and had the responsibility of appraising her work performance.
5 Abramson states that he never elevated any work-related concerns to his supervisors
6 regarding Plaintiff and that “[s]he was always the one willing to, you know, take the
7 computer home, work on weekends, get the job done.” (Abramson Dep., ECF No. 44-2
8 at 42-43). Abramson states,

9 [W]e . . . never ran into any work-related issues with Karmen Smiley . . .
10 I would say that she was punctual. And meet deadlines [sic], and she was
11 always good at getting those done. She was my go-to person as far as
12 issues we had with systems. She had a lot of contacts with both SAP and
Oracle. So if we needed detail somehow out of a system, I would go to
Karmen and ask her to help with that; very thorough, thoughtful . . . I
thought she was a very conscientious employee.

13 *Id.*

14 Plaintiff provides performance appraisals and reviews of her work from 2005 to
15 2013 in which she received marks of “meets expectations” and “exceeds expectations.”
16 (Exhibit E, ECF No. 44-2 at 28-39).

17 **III. Legal Standard**

18 “A party may move for summary judgment, identifying each claim or defense—or
19 the part of each claim or defense—on which summary judgment is sought. The court
20 shall grant summary judgment if the movant shows that there is no genuine dispute as
21 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
22 Civ. P. 56(a). A material fact is one that is relevant to an element of a claim or defense
23 and whose existence might affect the outcome of the suit. *See Matsushita Elec. Indus.*
24 *Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The materiality of a fact
25 is determined by the substantive law governing the claim or defense. *See Anderson v.*
26 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317,
27 322-24 (1986).

28 The moving party has the initial burden of demonstrating that summary judgment

1 is proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). The burden then
2 shifts to the opposing party to provide admissible evidence beyond the pleadings to
3 show that summary judgment is not appropriate. *See Anderson*, 477 U.S. at 256;
4 *Celotex*, 477 U.S. at 322, 324. The opposing party's evidence is to be believed, and all
5 justifiable inferences are to be drawn in its favor. *See Anderson*, 477 U.S. at 255. To
6 avoid summary judgment, the opposing party cannot rest solely on conclusory
7 allegations of fact or law. *See Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986).
8 Instead, the nonmovant must designate which specific facts show that there is a genuine
9 issue for trial. *See Anderson*, 477 U.S. at 256.

10 **IV. Contentions of the Parties**

11 Defendant contends that Plaintiff cannot establish the elements of her retaliation
12 claims because Plaintiff failed to make a protected disclosure to an individual covered
13 by California Labor Code section 1102.5(b); Plaintiff has not identified a specific
14 statute, rule or regulation she reasonably believes was violated; and, Plaintiff has not
15 reported an activity that amounts to a violation of law. (ECF No. 39-1 at 21-27).
16 Defendant contends that Noel, Umayam, and Ericson "did not have authority over
17 Plaintiff and [were] not responsible for, or have the authority to address, any issues
18 related to the cost allocations of the Q3 2015 Grifols Reclass." *Id.* at 22-23. Defendant
19 contends that any statements to Ren are not protected disclosures because Ren knew
20 about the Grifols Reclass prior to these conversations. *Id.* at 22. Defendant contends
21 that Plaintiff's claims regarding her termination for potential future disclosures are
22 outside the scope of the complaint and unsupported by any evidence. (ECF No. 46 at
23 5). Defendant contends that Plaintiff cannot establish a causal nexus between the
24 protected activity and an adverse employment action. (ECF No. 39-1 at 26). Defendant
25 contends that the decision to terminate Plaintiff's employment was based on inadequate
26 performance, unprofessional attitude, and insubordination, including Plaintiff's refusal
27 to attend a mandatory meeting with management. *Id.* at 27-28. Defendant contends that
28 the wrongful termination cause of action fails because Plaintiff "may not maintain a

1 wrongful termination in violation of public policy claim as a fall-back to a statutory
2 claim if the underlying statutory claim itself fails.” *Id.* at 19-20. Defendant contends
3 that Plaintiff’s requests for punitive damages and attorneys’ fees fail as a matter of law.
4 *Id.* at 29-30.

5 Plaintiff contends that she engaged in a protected activity by reporting to four
6 individuals who she believed had supervisory and managerial authority. (ECF No. 44
7 at 13-14). Plaintiff contends that a material issue of fact exists as to whether Plaintiff
8 alerted individuals in a managerial capacity. *Id.* at 15. Plaintiff contends that her
9 employment was terminated because Ren and O’Shea knew that the Grifols Reclass was
10 a violation and feared that Plaintiff would disclose the information. *Id.* at 15-16.
11 Plaintiff contends that she “believed Hologic’s unwillingness to provide back-up for the
12 [Grifols Reclass] would violate the Sarbanes-Oxley reporting requirements; would not
13 meet financial statement obligations under Generally Accepted Accounting Principles;
14 would implicate the Securities Act of 1933 . . . or the Securities and Exchange Act of
15 1934 . . . ; and would not survive auditor scrutiny.” (ECF No. 44 at 15). Plaintiff
16 contends there is a causal link between Plaintiff’s employment termination and her
17 reporting of the potential violation. *Id.* at 18. Plaintiff contends that Defendant’s
18 explanation of insubordination is insufficient. Plaintiff contends that Plaintiff did not
19 attend the July 20, 2015 meeting because she had a meeting scheduled three days later.
20 Plaintiff contends that the alleged deficiencies in Plaintiff’s work listed by Ren had
21 never been brought to Plaintiff’s attention. (ECF No. 44 at 17-18). Plaintiff contends
22 that she does not need to prove a violation of California Labor Code section 1102.5 to
23 succeed on her wrongful termination claim. *Id.* at 21. Plaintiff contends that summary
24 judgment as to punitive damages should be denied because a genuine issue of material
25 exists as to whether Hologic’s actions constituted malice, oppression, or fraud. *Id.* at
26 24. Plaintiff contends that a genuine issue of material fact exists as to whether she is
27 entitled to attorneys’ fees under California Code of Civil Procedure section 1021.5. *Id.*
28 at 24-25.

1 **V. Retaliation Under California Labor Code Section 1102.5(b)**

2 California's whistleblower statute, California Labor Code section 1102.5,
3 "reflects the broad public policy interest in encouraging workplace whistle blowers to
4 report unlawful acts without fearing retaliation." *Green v. Ralee Engineering Co.*, 960
5 P.2d 1046, 1052 (Cal. 1998). Subdivision (b) of California Labor Code section 1102.5
6 provides,

7 An employer, or any person acting on behalf of the employer, shall not
8 retaliate against an employee for disclosing information, or because the
9 employer believes that the employee disclosed or may disclose
10 information, to a government or law enforcement agency, to a person with
11 authority over the employee or another employee who has the authority to
12 investigate, discover, or correct the violation or noncompliance, or for
13 providing information to, or testifying before, any public body conducting
14 an investigation, hearing, or inquiry, if the employee has reasonable cause
15 to believe that the information discloses a violation of state or federal
16 statute, or a violation of or noncompliance with a local, state, or federal
17 rule or regulation, regardless of whether disclosing the information is part
18 of the employee's job duties.

19 Cal. Lab. Code § 1102.5(b).

20 Courts apply the burden-shifting analysis set forth by the United States Supreme
21 Court in *McDonnell Douglas v. Greene*, 411 U.S. 792 (1987), to claims under section
22 1102.5. *See, e.g., Weinstein v. HBE Corp.*, No. 2:13-CV-04643-CAS, 2014 WL
23 5602510, at *6 (C.D. Cal. Nov. 3, 2014). To establish a prima facie case of retaliation,
24 a plaintiff must demonstrate (1) she is engaged in a protected activity, (2) her employer
25 subjected her to an adverse employment action² and (3) there is a causal link between
26 the protected activity and the adverse employment action. *Patten v. Grant Joint Union*
27 *High Sch. Dist.*, 37 Cal. Rptr. 3d 113, 117 (Ct. App. 2005). "The requisite degree of
28 proof necessary to establish a prima facie case . . . on summary judgment is minimal
and does not even need to rise to the level of a preponderance of the evidence." *Wallis*
v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994).

29 "An employee engages in protected activity when she discloses . . . 'reasonably

30 ² Defendant does not contend that Plaintiff did not suffer an adverse employment
action.

1 based suspicions' of illegal activity.” *Mokler v. Cnty of Orange*, 68 Cal. Rptr. 3d 568,
2 580 (Ct. App. 2007). To establish a reasonably based suspicion of illegal activity, “an
3 employee need not prove an actual violation of law.” *Green*, 960 P.2d at 1059. “To
4 establish a prima facie case of retaliation, a plaintiff must show that she engaged in
5 protected activity, that she was thereafter subjected to adverse employment action by
6 her employer, and there was a causal link between the two.” *Morgan v. Regents of*
7 *Univ. of Cal.*, 105 Cal. Rptr. 2d 652, 666 (Ct. App. 2000) (citing *Guthrey v. State of*
8 *California*, 75 Cal. Rptr. 2d 27 (Ct. App. 1998)). “The causal link may be established
9 by an inference derived from circumstantial evidence, ‘such as the employer’s
10 knowledge that the [employee] engaged in protected activities and the proximity in time
11 between the protected action and allegedly retaliatory employment decision.”” *Id.*
12 (quoting *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988)). “Essential to a causal
13 link is evidence that the employer was aware that the plaintiff had engaged in the
14 protected activity.” *Id.* (quoting *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir.
15 1982)); *see also Feretti v. Pfizer Inc.*, No. 11cv4486, 2013 WL 140088, at *10 (N.D.
16 Cal. June 6, 2016) (“Thus, Plaintiff may establish causation by showing that: (1) one
17 of the decision makers responsible for each of the adverse employment actions taken
18 against Plaintiff had knowledge that Plaintiff had engaged in protected activity, and (2)
19 there is a close proximity in time between the protected activity and the adverse
20 employment action.”).

21 Once a plaintiff has established a prima facie case of retaliation, the defendant
22 must provide a legitimate, nonretaliatory explanation for the adverse employment
23 action. *See Patten*, 37 Cal. Rptr. 3d at 117. Once an employer satisfies its burden of
24 producing evidence of a legitimate reason for the termination, the plaintiff must ‘tender
25 a genuine issue of material fact as to pretext to avoid summary judgment.” *Payne v.*
26 *Northwest Corp.*, 113 F.3d 1079, 1080 (9th Cir. 1997). “When the plaintiff offers direct
27 evidence of discriminatory motive, a triable issue as to the actual motivation of the
28 employer is created even if the evidence is not substantial.” *Godwin v. Hunt Wesson*,

1 *Inc.* 150 F.3d 1217, 1221 (9th Cir. 1998).

2 [W]here direct evidence is unavailable, however, the plaintiff may come
3 forward with circumstantial evidence that tends to show that the
4 employer's proffered motives were not the actual motives because they are
inconsistent or otherwise not believable. Such evidence of 'pretense' must
be 'specific' and 'substantial' in order to create a triable issue . . .

5 *Id.* at 1222.

6 **A. Plaintiff's Prima Facie Case**

7 ***1. Disclosure to a Person with Authority***

8 To constitute a protected activity pursuant to section 1102.5, a disclosure must
9 be "to a person with authority over the employee or another employee who has the
10 authority to investigate, discover, or correct the violation or noncompliance." Cal.
11 Labor Code § 1102.5(b).³ It is undisputed that, "Plaintiff alleges that she disclosed her
12 concerns regarding the Q3 Grifols Reclass to Allison Ericson, Rich Noel, Chun Ren,
13 and Joy Umayam[]."⁴ (SUMF, ECF No. 46-1 at ¶ 2).

14 In her declaration, Ren states that she is a Senior Manager of Cost Accounting
15 at Hologic and was Plaintiff's direct supervisor. (Ren Decl., ECF No. 39-6 at 1-4). In
16 her deposition, Ren states that she instructed Plaintiff to do the Grifols Reclass around
17 July 1st or 2nd of 2015. (Ren Dep., ECF No. 39-4 at 80). The Court concludes that
18 Ren is "a person with authority over the employee or another employee who has the
19 authority to discover, or correct the violation or noncompliance." Cal. Labor Code §
20 1102.5. However, relying on *Mize-Kurman v. Marin Community College District*, 136
21 Cal. Rptr. 3d 259 (Ct. App. 2012), Defendant contends that any disclosure to Ren is not
22 a protected activity because Ren is the individual who instructed Plaintiff to complete

23 ³ Section 1102.5 also protects disclosures to a government or law enforcement
24 agency. Cal. Labor Code § 1102.5. The parties agree that Plaintiff did not disclose any
25 information to a government or law enforcement agency. (SUMF, ECF No. 46-1 at ¶
2).

26 ⁴ In her response to the statement of undisputed fact, Plaintiff does not dispute
27 that Plaintiff disclosed her concerns to Ericson, Noel, Ren and Umayam but states,
28 "Plaintiff disclosed her concerns, or those concerns were made known, to other Hologi
employees: Tom Cardoso; Stephanie Heller; John O'Shea; Glen Burkhardt; and Peter
Dunne." (SUMF, ECF No. 44-1 at ¶ 1). Plaintiff does not identify any evidence in
support of this assertion.

1 the Grifols Reclass and approved the journal entry.

2 In *Mize-Kurman*, a California court of appeal considered a jury instruction on
3 what constitutes a protected disclosure under two California whistleblower statutes,
4 including California Labor Code section 1102.5. 136 Cal. Rptr. 3d 265-66. The case
5 dealt with alleged disclosures made by a community college dean to her direct
6 supervisor. *Id.* at 266. The jury instruction stated, “Reporting publicly known facts is
7 not a protected disclosure.” *Id.* The court determined this was a proper limitation on
8 a disclosure under California law because a report of information that is already known
9 does not constitute a disclosure. *Id.* at 281-82. The court stated, “This conclusion is
10 consistent with those cases holding that the employee’s report to the employee’s
11 supervisor about the supervisor’s own wrongdoing is not a ‘disclosure’ and it not
12 protected whistleblower activity, because the employer *already knows* about his or her
13 wrongdoing.” *Id.* at 282.

14 The Court concludes that *Mize-Kurman* is distinguishable from this case because
15 it was decided prior to changes to section 1102.5 that form the basis of Plaintiff’s
16 claims. At the time *Mize-Kurman* was decided in 2012, section 1102.5(b) did not
17 provide protections for employees who report internally within a company or
18 organization. The former version of the statute provided:

19 An employer may not retaliate against an employee for disclosing
20 information to a government or law enforcement agency, where the
21 employee has reasonable cause to believe that the information discloses
a violation of state or federal statute, or a violation or noncompliance with
a state or federal rule or regulation.

22 *Id.* at 269 n.2 (quoting Cal. Labor Code § 1102.5(b)).⁵ In 2013, the California
23 Legislature amended section 1102.5(b), effective January 1, 2014, to add the current
24 language protecting disclosure “to a person with authority over the employee or to
25 another employee who has authority to investigate, discover, or correct the violation or

26
27 ⁵ This section was applicable in *Mize-Kurman*, because the plaintiff was a public
28 employee. *See Green*, 960 P.2d at 1052 (holding that in 1998, under the prior version
of the statute, “[s]ection 1102.5, subdivision (b), concerns employees who report to
public agencies. It does not protect plaintiff, who reported his suspicions directly to his
employer”).

1 noncompliance” and the language providing that an employer shall not retaliate
2 “because an employer believes the employee disclosed or may disclose information.”
3 (Stats. 2013, Ch. 781 (S.B. 496), § 4.1). In addition to protecting employees who have
4 made disclosures, section 1102.5(b) now provides that “an employer, or any person
5 acting on behalf of the employer, shall not retaliate against an employee . . . because the
6 employer believes that the employee disclosed or *may disclose* information . . . to a
7 person with authority over the employee or to another employees who has authority to
8 investigate, discover, or correct the violation or noncompliance.” Cal. Labor Code §
9 1102.5(b) (emphasis added).

10 Plaintiff provides evidence that she stated concerns about the Grifols Reclass
11 violating Sarbanes-Oxley to both Ren and Noel prior to her termination. In her
12 deposition, Plaintiff states that when Ren initially instructed Plaintiff to complete the
13 Grifols Reclass, “I told her we don’t have any basis for it, and I told them that’s against
14 [Sarbanes-Oxley], because it’s a 3.4 million, and it’s a big flier for Ernst & Young; and
15 they would like to have a details [sic] analysis of what they’re for.” (Smiley Dep., ECF
16 No. 44-2 at 14). Plaintiff states in her deposition that the day before she was terminated
17 she told Ren and Umayam about Plaintiff’s conversation with Noel.⁶ (Smiley Dep.,
18 ECF No. 39-4 at 28-30). Ren was in a supervisory capacity over Plaintiff and there is
19 evidence that Ren was involved in the decision to terminate Plaintiff. (Ren Decl., ECF
20 No. 39-6 at 1-4). Section 1102.5(b) protects employees where they face retaliation
21 arising out of their employers’ concerns about future disclosures. Plaintiff’s statements
22 to Ren and Ren’s awareness of Plaintiff’s statements to Noel provide evidence that
23 Plaintiff was terminated because Defendant believed that Plaintiff “may disclose
24 information.” Cal. Labor Code § 1102.5(b). The Court concludes that Plaintiff raises
25 a material issue of fact as to whether Plaintiff was fired because Defendant believed that
26

27 ⁶ Defendant contends that the decision to terminate Plaintiff was finalized prior
28 to this conversation. Thomas Cardosa states in his declaration that the decision to
terminate Plaintiff was “finalized no later than July 21, 2015.” (Cardosa Decl., ECF
No. 39-8).

1 Plaintiff may disclose information related to the Grifols Reclass.

2 ***2. Statute, Rule or Regulation Reasonably Believed to Be Violated***

3 Plaintiff provides evidence that she had reasonably based suspicions of illegal
4 activity. In her deposition, Plaintiff states that she contacted Noel because she believed
5 that the Grifols Reclass was unsupported by documentation and violated the Sarbanes-
6 Oxley Act. (ECF No. 39-4 at 36). Plaintiff states when Ren instructed her to perform
7 the Grifols Reclass, she told Ren there was no basis for this action and it was against
8 Sarbanes-Oxley. (Smiley Dep., ECF No. 44-2 at 13). In Noel's deposition, he states
9 that Plaintiff contacted him about concerns over the appropriateness of a correcting
10 journal entry. (Noel Dep., ECF No. 44-2 at 21). California law requires a reasonably
11 based suspicion of illegal activity; it does not require Plaintiff to prove a violation
12 occurred. *Green*, 960 P.2d at 1059. The Court finds that Plaintiff provides sufficient
13 evidence to raise a material issue of fact as to whether she disclosed reasonably based
14 suspicions of illegal activity.

15 ***3. Causal Connection***

16 Plaintiff provides evidence that Ren had knowledge of Plaintiff's engagement in
17 a protected activity and that a close proximity in time existed between Plaintiff's actions
18 regarding the Grifols Reclass and her termination. *See also Feretti*, 2013 WL 140088,
19 at *10 ("Plaintiff may establish causation by showing that: (1) one of the decision
20 makers responsible for each of the adverse employment actions taken against Plaintiff
21 had knowledge that Plaintiff had engaged in protected activity, and (2) there is a close
22 proximity in time between the protected activity and the adverse employment action.").
23 In her deposition, Plaintiff stated that Plaintiff raised her concerns about the Sarbanes-
24 Oxley violation when Ren initially instructed her to complete the Grifols Reclass.
25 (Smiley Dep., ECF No. 44-2 at 13). Plaintiff stated that she informed Umayam and Ren
26 about her conversation with Noel the day before Plaintiff was terminated. (Smiley
27 Dep., ECF No. 39-4 at 28-29). Ren stated in her declaration that she and Thomas
28 Cardosa made the decision to terminate Plaintiff. (Ren Decl., ECF No. 39-6 at 1-4).

1 Further, Plaintiff provides facts to establish a close proximity in time between the
2 protected activity and the termination. According to testimony from Ren, the Grifols
3 Reclass took place in the beginning of July 2015. (Chen Dep., ECF No. 39-4 at 78).
4 Plaintiff provides evidence that her statements to Ren about both her concerns about the
5 Grifols Reclass and her conversation with Noel took place in the weeks following the
6 Grifols Reclass. (Smiley Dep., ECF Nos. 44-2 at 13; 39-4 at 28-29). In his declaration,
7 Thomas Cardoso stated that Plaintiff was terminated on July 24, 2015. (Cardosa Decl.,
8 ECF No. 39-8).

9 Plaintiff provides sufficient evidence to establish a material issue of fact as to
10 causal nexus. The Court finds that Plaintiff has provided the minimal degree of proof
11 necessary to establish a prima facie case for purposes of summary judgment. *See*
12 *Wallis*, 26 F.3d at 889.

13 **B. Legitimate Nonretaliatory Explanation and Pretext**

14 Defendant provides evidence that Plaintiff was terminated for insubordination
15 after Plaintiff declined to attend a meeting requested by her supervisor. Defendant
16 provides copies of email transcripts in which Plaintiff declines the meeting invitation
17 and Ren, Plaintiff's supervisor, informs Plaintiff that her attendance is important. (*See*,
18 *e.g.*, Exhibit C, ECF No. 39-4 at 44, 67-68). Defendant provides declarations stating
19 that the decision to terminate Plaintiff followed her failure to attend the scheduled July
20 20, 2015 meeting. (Cardosa Decl., ECF No. 39-8 ; Ren Decl., ECF No. 39-6 at 1-4).
21 Defendant provides a list of deficiencies with Plaintiff's work performance compiled
22 in preparation for the performance review meeting scheduled for July 20, 2015.
23 (Exhibit A, ECF No. 39-7 at 3-5). The Court concludes that Defendant provides
24 evidence of a legitimate, nonretaliatory reason for terminating Plaintiff sufficient to
25 satisfy its burden on a motion for summary judgment.

26 Because Defendant provides sufficient evidence of a legitimate, nonretaliatory
27 reason for the termination, Plaintiff must demonstrate that there is a genuine issue of
28 material fact as to whether the explanation provided for the termination is pretext for

1 retaliation. While temporal proximity alone is not enough to establish pretext after a
2 employer has provided a legitimate, nonretaliatory explanation, in this case, Plaintiff
3 provides additional circumstantial evidence of pretext. *See Arteaga v. Brink's, Inc.*, 77
4 Cal. Rptr. 3d 654, 675 (Ct. App. 2008). In his deposition, Joseph Abramson, who was
5 in a supervisory capacity over Plaintiff for 5-6 years, stated that Plaintiff was
6 consistently a conscientious employee. Abramson states that he never had concerns
7 about Plaintiff's work. (Abramson Dep., ECF No. 44-2 at 42-43). Plaintiff provides
8 performance reviews of her work from 2005 to 2013 showing positive reviews of her
9 work performance. (Exhibit E, ECF No. 44-2 at 28-39). The Court concludes that
10 Plaintiff provides facts sufficient to raise a disputed issue of material fact as to whether
11 Defendant's explanation for the employment termination was pretext for retaliation.

12 The motion for summary judgment as to Plaintiff's cause of action under
13 California Labor Code section 1102.5(b) is denied.

14 **VI. Wrongful Termination in Violation of Public Policy**

15 To prevail on a claim for wrongful termination in violation of public policy, a
16 plaintiff must establish that (1) an employer-employee relationship existed; (2)
17 plaintiff's employment was terminated; (3) the violation of public policy was a
18 motivating reason for the termination; and (4) the termination was the cause of
19 plaintiff's damages. *Haney v. Aramark Unif. Servs., Inc.*, 17 Cal. Rptr. 3d 336, 348-49
20 (Ct. App. 2004).

21 Defendant contends that Plaintiff's claim for wrongful termination must rise and
22 fall with her claim under Labor Code section 1102.5 because it is premised on the exact
23 same allegations and conduct. (ECF No. 39-1 at 19). The Court denied Defendant's
24 motion for summary judgment as to the cause of action under California Labor Code
25 section 1102.5(b). Accordingly, Defendant's motion for summary judgment as to the
26 cause of action for wrongful termination in violation of public policy is denied.

27 **VII. Punitive Damages**

28 Punitive damages are available for both of Plaintiff's causes of action. Cal. Civ.

1 Code § 3924.; *see also Weinstein*, 2014 WL 5602510 at *9. Pursuant to California
2 Civil Code section 3294(a),

3 In an action for the breach of an obligation not arising from contract,
4 where it is proven by clear and convincing evidence that the defendant has
5 been guilty of oppression, fraud, or malice, the plaintiff, in addition to the
actual damages, may recover damages for the sake of example and by way
of punishing the defendant.

6 Cal. Civ. Code § 3294(a). Subdivision (b) of California Civil Code section 3924
7 provides:

8 An employer shall not be liable for damages pursuant to subdivision (a),
9 based upon acts of an employee of the employer, unless the employer had
advance knowledge of the unfitness of the employee and employed him
10 or her with a conscious disregard of the rights or safety of others or
authorized or ratified the wrongful conduct for which the damages are
11 awarded or was personally guilty of oppression, fraud, or malice. With
respect to a corporate employer, the advance knowledge and conscious
12 disregard, authorization, ratification or act of oppression, fraud, or malice
must be on the part of an officer, director, or managing agent of the
13 corporation.

14 Cal. Civ. Code § 3294(b). At this stage in the proceedings, the Court cannot conclude
15 that Plaintiff is not entitled to punitive damages as a matter of law.

16 **VIII. Attorneys' Fees**

17 California Code of Civil Procedure provides,

18 Upon motion, a court may award attorneys' fees to a successful party
against one or more opposing parties in any action which has resulted in
19 the enforcement of an important right affecting the public interest if: (a)
a significant benefit, whether pecuniary or nonpecuniary, has been
20 conferred on the general public or a large class of persons, (b) the
necessity and financial burden of private enforcement . . . are such as to
21 make the award appropriate, and (c) such fees should not, in the interest
of justice be paid out of the recovery, if any.

22 Cal. Civ. Code § 1021.5; *see also Satrap v. Pac. Gas & Elec. Co.*, 49 Cal. Rptr. 2d 348
23 (Ct. App. 1996). The Court declines to strike Plaintiff's request for attorneys' fees at
24 this stage in the proceedings.


25 **IX. Conclusion**

26 IT IS HEREBY ORDERED that the motion for summary judgment filed by
27 Defendant Hologic, Inc. is DENIED. (ECF No. 39)

28 IT IS FURTHER ORDERED that a Pretrial Conference on this matter is

1 scheduled for Friday, June 23, 2017 at 10 a.m. in Courtroom 14B before Judge William
2 Q. Hayes.

3 DATED: April 12, 2017

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5 **WILLIAM Q. HAYES**
6 United States District Judge
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